QUESTION PRESENTED

Whether petitioner's conviction and concurrent sentence for drug conspiracy, in violation of 21 U.S.C. 846, must be vacated in light of his conviction and sentence for operating a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848, where the "in concert with" element of the CCE violation was based on the same agreement as the Section 846 conspiracy.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	4
Argument:	
I. Petitioner's judgments of conviction and concurrent life sentences for the CCE and drug conspiracy offenses should be affirmed	6
A. The Double Jeopardy Clause permits multiple punishment for the CCE and drug conspiracy offenses if that is the intention of Congress	8
B. Congress intended to permit separate, concurrent punishments for a Section 846 drug conspiracy and CCE offense based on the same agreement	12
II. If the Court concludes that the entry of separate convictions and concurrent sentences contravenes congressional intent, the appropriate course would be to require entry of a single, merged conviction and sentence on the two counts	24
Conclusion	31
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981)	8
Ball v. *United States*, 470 U.S. 856 (1985)	8, 17, 18, 19, 20, 22, 26
Bell v. *United States*, 349 U.S. 81 (1955)	11
Blockburger v. *United States*, 284 U.S. 299 (1932)	8
Garrett v. *United States*, 471 U.S. 773 (1985)	8, 17
Gore v. *United States*, 357 U.S. 386 (1958)	11
Iannelli v. *United States*, 420 U.S. 770 (1975)	10

Cases—Continued: Page

Jeffers v. *United States*:
423 U.S. 1066 (1976) 13
432 U.S. 137 (1977) 9, 10, 12, 13, 15, 17
Missouri v. *Hunter*, 459 U.S. 359 (1983) 8
Ohio v. *Johnson*, 467 U.S. 493 (1984) 8
Ray v. *United States*, 481 U.S. 736 (1987) 7, 27
Tinder v. *United States*, 345 U.S. 565 (1953) 26
United States v. *Aiello*, 771 F.2d 621 (2d Cir. 1985) 25, 29
United States v. *Andersson*, 813 F.2d 1450 (9th Cir. 1987) 28
United States v. *Ball*, 734 F.2d 965 (4th Cir. 1984), vacated and remanded, 470 U.S. 856 (1985) 18
United States v. *Benevento*, 836 F.2d 60 (2d Cir. 1987), cert. denied, 486 U.S. 1043 (1988) 25-26
United States v. *Bond*, 847 F.2d 1233 (7th Cir. 1988) 12, 21
United States v. *Broce*, 488 U.S. 563 (1989) 11
United States v. *Butera*, 677 F.2d 1376 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983) 27
United States v. *Butler*, 885 F.2d 195 (4th Cir. 1989) 30
United States v. *Chambers*, 944 F.2d 1253 (6th Cir. 1991), cert. denied, 502 U.S. 1112 & 503 U.S. 989 (1992) 12, 15, 30
United States v. *Cloutier*, 966 F.2d 24 (1st Cir. 1992) 30
United States v. *Compton*, 5 F.3d 358 (9th Cir. 1993) 28
United States v. *Cruz*, 805 F.2d 1464 (11th Cir. 1986), cert. denied, 481 U.S. 1006 & 482 U.S. 930 (1987) 30
United States v. *De Bright*, 730 F.2d 1255 (9th Cir. 1984) 27

Cases—Continued: Page

United States v. *Devine*, 934 F.2d 1325 (5th Cir.), cert. denied, 502 U.S. 929 (1991), 502 U.S. 1047, 1064, 1065, 1092 & 1104 (1992) 12
United States v. *Fernandez*, 916 F.2d 125 (3d Cir. 1990), cert. denied, 500 U.S. 948 (1991) 14
United States v. *Ganci*, 47 F.3d 72 (2d Cir. 1995) .. 12
United States v. *Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990) 28
United States v. *Hooper*, 432 F.2d 604 (D.C. Cir. 1970) 27
United States v. *Jelinek*, 57 F.3d 655 (8th Cir. 1995), petition for cert. pending, No. 95-5343 ..... 15, 30
United States v. *Lampley*, 573 F.2d 783 (3d Cir. 1978) 27
United States v. *Langella*, 804 F.2d 185 (2d Cir. 1986) 11
United States v. *Lindsay*, 985 F.2d 666 (2d Cir.), cert. denied, 114 S. Ct. 103 (1993) 12, 25
United States v. *Liquori*, 5 F.3d 435 (9th Cir. 1993), cert. denied, 114 S. Ct. 738 (1994) 23
United States v. *Luciano-Mosquera*, Nos. 92-1923 et al., 1995 WL 500601 (1st Cir. Aug. 28, 1995) 29
United States v. *Marable*, 578 F.2d 151 (5th Cir. 1978) 11
United States v. *McHan*, 966 F.2d 134 (4th Cir. 1992) 11
United States v. *Nelson*, 733 F.2d 364 (5th Cir.), cert. denied, 469 U.S. 937 (1984) 27
United States v. *Nyhuis*, 8 F.3d 731 (11th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994) 12
United States v. *Palafox*, 764 F.2d 558 (9th Cir. 1985) 27, 28

Cases—Continued: Page

United States v. *Peters*, 617 F.2d 503 (7th Cir. 1980) 27
United States v. *Rivera*, 900 F.2d 1462 (10th Cir. 1990) 30
United States v. *Ruggiero*, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127, 1137 (1985) 11
United States v. *Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989) 28
United States v. *Sanchez-Vargas*, 878 F.2d 1163 (9th Cir. 1989) 28
United States v. *Shabani*, 115 S. Ct. 382 (1994) 16
United States v. *Vargas*, 615 F.2d 952 (2d Cir. 1980) 27
United States v. *Wilson*:
440 F.2d 1103 (5th Cir.), cert. denied, 404 U.S. 882 (1971) & 405 U.S. 1016 (1972) 29
671 F.2d 1138 (8th Cir.), cert. denied, 456 U.S. 994 (1982) 27

Constitution, statutes and Sentencing Guidelines:

U.S. Const. Amend. V (Double Jeopardy Clause) 4, 8, 10, 12, 13
Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987:
§ 212, 98 Stat. 1987 22
§ 218, 98 Stat. 2027 22
18 U.S.C. 922(g) 2
18 U.S.C. 922(h)(1) (1982) 18
18 U.S.C. 924(c) 2
18 U.S.C. App. 1202(a)(1) (1982) 18
18 U.S.C. 3013 ..... 2, 4, 7, 27
21 U.S.C. 802(43) (to be codified in 1994 edition) 23
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b)(1)(A) 23
21 U.S.C. 846 ..... *passim*, 1a
21 U.S.C. 848 ..... 2, 16, 1a
21 U.S.C. 848(a)-(e) 2, 1a-5a

Statutes and Sentencing Guidelines—Continued: Page

21 U.S.C. 848(b) 16, 2a
21 U.S.C. 848(c) 3, 3a
21 U.S.C. 848(e)(2) 9, 3a
21 U.S.C. 848(e)(2)(A) 19, 3a
21 U.S.C. 848(e)(2)(B) 19, 3a
21 U.S.C. 848(e) 16, 4a
Sentencing Guidelines:
§ 4A1.1 22
§ 4A1.2, Application Note 3 23
§ 4A1.2(a)(2) 23

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-8769

TOMMY L. RUTLEDGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 25-47) is reported at 40 F.3d 879.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1994. A petition for rehearing was denied on January 3, 1995. J.A. 48. The petition for a writ of certiorari was filed on April 3, 1995, and was granted on June 26, 1995. J.A. 49. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, which are set forth in an appendix to this brief: 21 U.S.C. 846 (drug conspiracy); 21 U.S.C. 848(a)-(e) (continuing criminal enterprise).

STATEMENT

After a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted of operating a continuing criminal enterprise (CCE) (Count 1), in violation of 21 U.S.C. 848; conspiring to distribute cocaine (Count 2), in violation of 21 U.S.C. 846; distributing cocaine (Count 3), in violation of 21 U.S.C. 841(a)(1); possessing a firearm after being convicted of a felony (Count 4), in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking offense (Counts 5, 6), in violation of 18 U.S.C. 924(c). J.A. 8-9. He was sentenced to concurrent terms of life imprisonment without possible release for the CCE, drug conspiracy, and distribution of cocaine offenses, and other terms of imprisonment for the other offenses. He was not fined, but he was ordered to pay a special assessment on each Count of $50 under 18 U.S.C. 3013. J.A. 9-10. The court of appeals affirmed. J.A. 25-47.

1. Petitioner was the leader of a large drug organization that distributed multi-kilogram quantities of cocaine from 1988 to 1990. He bought cocaine from the Latin Kings street gang in Chicago and distributed it in Warren County, in northern Illinois. Petitioner kept firearms for protection, and he also traded firearms for cocaine. J.A. 26-28.

2. The second superseding indictment charged petitioner with the six offenses recited above. J.A. 2-7. In order to convict petitioner on the CCE charged in Count 1, the jury had to find that petitioner committed a felony drug offense in violation of Subchapter I or II of Chapter 13 of Title 21, as part of a continuing series of such violations, which were undertaken "in concert with" five or more other persons of whom the defendant was an organizer, supervisor, or manager, and from which he obtained substantial income or resources. 21 U.S.C. 848(c); J.A. 2-3. In order to convict petitioner of the drug conspiracy charged in Count 2, the jury was required to find that petitioner conspired to possess cocaine with intent to distribute it and that he distributed cocaine. The Count 2 drug conspiracy charge was based on the same criminal agreement that formed the basis of the "in concert with" element of the Count 1 CCE charge; it involved the same persons, the same time periods, and the same overt acts. J.A. 2-5.

All counts were submitted to the jury and the jury returned guilty verdicts on all of them. J.A. 8.

3. The district court sentenced petitioner to concurrent terms of life imprisonment without possible release for the Count 1 CCE offense, the Count 2 drug conspiracy offense, and the Count 3 substantive cocaine-distribution offense. J.A. 10. The court also imposed ten years' imprisonment for the Count 4 offense of possession of a firearm as a convicted felon, to run concurrently with the three life sentences; five years' imprisonment for the Count 5 offense of using or carrying a firearm during and in relation to a drug trafficking offense, to run con-

secutively to all other sentences, and ten years' imprisonment for the like offense under Count 6, to run consecutively to all other sentences. *Ibid.* The court imposed the $50 special assessment under 18 U.S.C. 3013 on each count, for a total of $300. J.A. 9.

4. The court of appeals affirmed. J.A. 25-47. Petitioner claimed that his conviction and sentence on both the CCE and the drug conspiracy charge violated the Double Jeopardy Clause, because it amounted to punishing him twice for the same offense. The court of appeals rejected that claim, reasoning that, "[w]hile the conspiracy charge is a lesser included offense of the CCE charge, double jeopardy is not implicated as long as [the] district court does not impose cumulative sentences for the crimes." J.A. 37-38. The court held that, "by imposing concurrent sentences, the district court did not impose a cumulative penalty, and [petitioner's] sentence is proper." J.A. 38.

SUMMARY OF ARGUMENT

It is well settled that a defendant may be indicted, tried, and found guilty by a jury in a single proceeding of both violating the CCE statute and committing a drug conspiracy in violation of 21 U.S.C. 846, where the same agreement is involved in both offenses. The question in this case is whether a court may enter dual convictions and concurrent sentences based on a jury verdict that finds the defendant guilty of both the CCE and the conspiracy charge. As with other questions about whether multiple punishments may be imposed in a single proceeding for the same offense, the answer to that question turns on congressional intent. In our view, the structure, legislative history, and purposes underlying the CCE and drug conspiracy statutes indicate that Congress intended that

a defendant convicted of both be subject to dual convictions and concurrent sentences.

While the conduct prohibited by the CCE and drug conspiracy statutes is related, the two provisions differ substantially. The elements of each offense and the punishments for each offense are defined in distinct statutes that do not refer to each other. Moreover, the CCE offense is a hybrid conspiracy/substantive offense that is fundamentally different from the "pure" Section 846 drug conspiracy offense. As a result, many "simple" drug conspiracy cases will not involve commission of a CCE offense by anyone, and in others at least some of the defendants who conspired to distribute drugs would not have violated the CCE statute. Accordingly, it is reasonable to infer that Congress intended that separate convictions be entered when a defendant violates both the drug conspiracy and CCE statutes, even though Congress may not have intended that the total sentence exceed what would be imposed for the more serious of the two offenses (normally, the CCE).

An additional important reason for inferring that Congress intended to permit entry of dual convictions and concurrent sentences is that this procedure is the simplest and most rational way to ensure that, if a defendant's CCE conviction is ultimately overturned on appeal or collateral attack, he would still be punished for his commission of a Section 846 drug conspiracy. Congress would not have wanted to permit such a defendant to escape punishment, or to require complicated procedures for its imposition. And there is no reason to think that Congress would have wished to protect a defendant from the possible adverse consequences flowing from the entry of the

second conviction, because a defendant convicted of a CCE offense is not likely to experience collateral consequences from the entry of a drug conspiracy conviction when that conviction carries a concurrent sentence with the CCE.

If the Court holds that Congress did not intend to permit dual convictions and concurrent sentences, the Court must determine the procedure a district court should follow when a jury returns verdicts of guilty on CCE and drug conspiracy charges based on the same agreement. In our view, the most efficient and workable approach is that adopted by the Second Circuit, under which the two verdicts of guilty on the CCE and Section 846 drug conspiracy counts merge into a single judgment of conviction, with a single sentence that can be no greater than the sentence that would have been imposed for the more serious of the two offenses. Under that approach, the defendant suffers no conceivable adverse consequences. The government, however, is ensured that, if the CCE conviction (but not the drug conspiracy conviction) is ever reversed, a court can still punish the defendant for the Section 846 drug conspiracy of which the jury found him guilty.

ARGUMENT

I. PETITIONER'S JUDGMENTS OF CONVICTION AND CONCURRENT LIFE SENTENCES FOR THE CCE AND DRUG CONSPIRACY OFFENSES SHOULD BE AFFIRMED

Petitioner was convicted of a Section 846 drug conspiracy and of violating the CCE statute. Both the Section 846 drug conspiracy and the "in concert with" element of the CCE offense were satisfied by proof of the same agreement. The Seventh Circuit

held that, in those circumstances, the district court properly entered a separate conviction for each of the two offenses and imposed concurrent prison sentences for the two offenses. Petitioner was not subjected to a longer term of imprisonment than he would have received for the CCE offense alone and, since no fine was imposed, he was not subjected to a greater fine than he would have received for the CCE offense alone. In our view, that disposition accords with congressional intent regarding dual punishment for CCE and a Section 846 drug conspiracy based on the same agreement. The judgment of the Seventh Circuit should therefore be affirmed.[1]

---

[1] We note that the judgments on the CCE and the drug conspiracy counts were not concurrent in one respect: a special assessment of $50 under 18 U.S.C. 3013 was imposed on petitioner for each of those counts. J.A. 9; see *Ray* v. *United States*, 481 U.S. 736, 737 (1987) (per curiam). Petitioner, however, did not challenge the imposition of those two special assessments either in the court of appeals or in this Court, and the question presented by the petition presupposes that the two sentences are fully concurrent. See Pet. i; Pet. Br. i. Therefore, it is not necessary to decide in this case whether it is permissible to impose a special assessment as well as a separate judgment of conviction on both the CCE and drug conspiracy offenses. If it were necessary to reach that question, however, the result would in our view turn on whether CCE and a Section 846 drug conspiracy are in fact the "same offense" and therefore subject to only a single assessment under 18 U.S.C. 3013. For the reasons given in note 5, *infra*, we believe that they are not, strictly speaking, the "same offense," and that separate $50 special assessments on each count are therefore appropriate.

A. The Double Jeopardy Clause Permits Multiple Punishment For The CCE And Drug Conspiracy Offenses If That Is The Intention Of Congress

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The only aspect of the protection afforded by that Clause at issue in this case is the protection against multiple punishments for the same offense. See *Missouri* v. *Hunter*, 459 U.S. 359, 365-366 (1983). The Court has made clear that, in a single proceeding, the government may prosecute a defendant for multiple offenses that are constitutionally the "same offense" without violating the Double Jeopardy Clause. *Ohio* v. *Johnson*, 467 U.S. 493, 500 (1984); see also *Ball* v. *United States*, 470 U.S. 856, 865 (1985). And when the defendant is convicted in a single proceeding of two offenses that are constitutionally the same, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Garrett* v. *United States*, 471 U.S. 773, 793 (1985), quoting *Missouri* v. *Hunter*, 459 U.S. at 366; see *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible [in a single proceeding] is not different from the question of what punishments the Legislative Branch intended to be imposed.").

Normally, the Court determines whether two offenses are the "same" for double jeopardy purposes by determining whether each requires proof of an element that the other does not. See *Blockburger* v. *United States*, 284 U.S. 299 (1932). The CCE offense and the drug conspiracy offense are related to each other, if at all, through one element. Among the elements of a CCE violation is proof of "a continuing series of violations of [Subchapters I or II of Chapter 13 of Title 21] * * * which are undertaken by [the defendant] *in concert with* five or more other persons." 21 U.S.C. 848(c)(2) (emphasis added). A Section 846 drug conspiracy violation is established by proof that the defendant "conspire[d] to commit any offense defined in [Subchapter I of Chapter 13 of Title 21]." If proof of the "in concert with" element of the CCE violation requires proof that the defendant "conspire[d]" to commit a Subchapter I drug offense, then a drug conspiracy in violation of Section 846 may be viewed as a lesser included offense of the CCE offense.

In *Jeffers* v. *United States*, 432 U.S. 137 (1977), the Court considered, but did not resolve, the question whether a drug conspiracy is a lesser included offense of a CCE when the two charges rest on the same agreement. Four Justices, in a plurality opinion written by Justice Blackmun, assumed without deciding that drug conspiracy may be a lesser included offense of the CCE offense. *Id.* at 150 & n.16.[2] Four

[2] Justice Blackmun's opinion merely "assume[d]" and did not actually decide that the CCE and drug conspiracy offenses were the "same offense" in this context. See 432 U.S. at 149-150 & n.16 (opinion of Blackmun, J.); *id.* at 155 ("We have concluded that [Congress did not intend to allow cumulative punishment for violations of §§ 846 and 848], and this again makes it unnecessary to reach the lesser-included-offense issue."). For purposes of rejecting Jeffers' claim that he could not be prosecuted sequentially for the two offenses, it was necessary only to assume, not decide, the same-offense question: The plurality concluded that he could be prosecuted sequentially under the facts of the case whether or not the two

other Justices, in an opinion by Justice Stevens, apparently would have accepted that proposition without qualification. *Id.* at 158-159 (opinion of Stevens, J., dissenting in part and concurring in the judgment in part). Justice White, writing for himself, took the view that CCE and drug conspiracy offenses were never the same offense. *Id.* at 158 (White, J., concurring in the judgment in part and dissenting in part).[3]

In our view, this case may be resolved on the same assumption made by the plurality in *Jeffers*, *i.e.*, that a Section 846 drug conspiracy may be regarded as a lesser included offense of CCE, when as a factual matter both offenses involved the establishment of the same criminal agreement.[4] If the assumption made by

---

offenses were the "same offense." Likewise, it was necessary only to assume, not decide, that the two offenses were the "same offense" for purposes of deciding the double-punishment issue: If, as the plurality concluded, Congress did not intend cumulative sentences when the CCE and drug conspiracy offenses were based on identical criminal agreements, then a court had no statutory authority to impose cumulative sentences regardless of whether the two crimes were the "same offense" under the Double Jeopardy Clause.

[3] Justice White relied on the rationale of *Iannelli* v. *United States*, 420 U.S. 770 (1975), and therefore concluded that the CCE and drug conspiracy offenses could support separate prosecutions, as well as separate punishments. 432 U.S. at 158.

[4] Even if that assumption is correct, a particular charged Section 846 conspiracy would not necessarily be a lesser included offense of a particular charged CCE offense. Such a relationship would exist only if proof of the greater offense on the facts of the particular case necessarily proves all elements of the lesser offense. For example, although assault is generally a lesser included offense of murder, a defendant who assaults one individual and then murders another has

the *Jeffers* plurality is correct, then the issue in this case is whether, and to what extent, Congress intended separate punishments for a CCE offense and a lesser included drug conspiracy. But even if that assumption is not correct, the same analysis would determine the outcome in this case, because a federal court in any event has only the sentencing authority granted by Congress and is limited to imposing the punishment authorized by Congress. See, *e.g.*, *Gore* v. *United States*, 357 U.S. 386 (1958); *Bell* v. *United States*, 349 U.S. 81 (1955). Accordingly, we proceed on the basis of the *Jeffers* assumption.[5]

---

committed two entirely distinct offenses. Similarly, even if a Section 846 drug conspiracy is a lesser included offense of a CCE, the two would be entirely distinct if the agreement on which the Section 846 conspiracy is based is distinct from the agreement on which the "in concert with" element of the CCE is based. The courts of appeals have long employed a multi-factor, totality-of-the-circumstances test to determine whether two charged agreements that form the basis for two conspiracy or CCE charges are in fact the same. See, *e.g.*, *United States* v. *McHan*, 966 F.2d 134, 137-138 (4th Cir. 1992); *United States* v. *Langella*, 804 F.2d 185, 189 (2d Cir. 1986); *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127, 1137 (1985); *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978); cf. *United States* v. *Broce*, 488 U.S. 563, 585 n.2 (1989) (Blackmun, J., dissenting). The application of that test is not at issue in this case, because all parties to this case agree, as in *Jeffers*, that the Section 846 drug conspiracy with which petitioner was charged is based on the same agreement as the "in concert with" element of the CCE.

[5] The government contended in *Jeffers* that drug conspiracy is not a lesser included offense of the CCE offense, because the "in concert with" element does not require proof of a conspiracy. See U.S. Br. in *Jeffers* at 23, No. 75-1805. Our argument was that a CCE defendant may be found to have acted "in concert with" others so long as the defendant acted

B. Congress Intended To Permit Separate, Concurrent Punishments For A Section 846 Drug Conspiracy And CCE Offense Based On The Same Agreement

1. The Seventh Circuit's approach to the issue in this case—permitting two convictions and concurrent sentences—mirrors the result in *Jeffers*.[6] In *Jeffers*, the defendant—like petitioner—was convicted of a Section 846 drug conspiracy and CCE. He was sentenced to the maximum applicable punishment of 15 years' imprisonment and a $25,000 fine for the Section 846 drug conspiracy, see 432 U.S. at 143

---

with criminal intent, even if the other participants in the enterprise were unaware of the true criminal character of the enterprise and thus were not conspirators with him. Although we adhere to that position, the courts of appeals have not generally accepted it in recent years. See J.A. 37-38; *United States* v. *Nyhuis*, 8 F.3d 731, 735 (11th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994); *United States* v. *Lindsay*, 985 F.2d 666, 670 (2d Cir.), cert. denied, 114 S. Ct. 103 (1993); *United States* v. *Chambers*, 944 F.2d 1253, 1268 (6th Cir. 1991), cert. denied, 502 U.S. 1112 and 503 U.S. 989 (1992); *United States* v. *Devine*, 934 F.2d 1325, 1342 (5th Cir.), cert. denied, 502 U.S. 929 (1991), 502 U.S. 1047, 1064, 1065, 1092 & 1104 (1992). As discussed, however, this case in any event turns on congressional intent, not whether the CCE and drug conspiracy statutes define the same offense for double jeopardy purposes. Accordingly, in our view, it is not necessary to resolve that issue in this case.

[6] See *United States* v. *Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988) ("*Jeffers* treated [CCE and a Section 846 drug conspiracy] as sufficiently distinct to support separate convictions (even to allow sequential trials), but not sufficiently distinct to support cumulative punishments."); see also *United States* v. *Ganci*, 47 F.3d 72, 73 (2d Cir. 1995) (citing *Jeffers* for the proposition that dual convictions for CCE and drug conspiracy do not violate the Double Jeopardy Clause).

(opinion of Blackmun, J.), and he was sentenced to a concurrent term of life imprisonment and a separate fine of $100,000 for the CCE, *id.* at 145. This Court did not require either of the convictions or either of the prison sentences to be vacated. It did, however, roll back the CCE fine to $75,000 "so that the two fines together do not exceed $100,000," *id.* at 158, the statutory maximum fine for the CCE offense at that time and the amount that would have been imposed had the defendant been convicted only of the CCE offense.[7]

Jeffers differs from this case in one respect. Unlike in this case, in *Jeffers* the Section 846 drug conspiracy and the CCE conviction were separately prosecuted. This Court declined to review Jeffers' Section 846 conviction. See *Jeffers* v. *United States*, 423 U.S. 1066 (1976). Therefore, the Court had before it only the CCE conviction and sentence. Moreover, since the Court concluded that the separate prosecution of the CCE and drug conspiracy charges did not violate the Double Jeopardy Clause's protection against multiple prosecutions, see 432 U.S. at 147-154 (opinion of Blackmun, J.); *id.* at 158 (White, J.,

---

[7] The four-Member plurality represented by Justice Blackmun's opinion, together with Justice White (who believed that CCE and a drug conspiracy were entirely distinct offenses, see 432 U.S. at 158), formed a majority for affirming the conviction and prison sentence. Eight Members of the Court—all but Justice White—voted in favor of partially rolling back the fine. See *id.* at 154-158 (opinion of Blackmun, J.); *id.* at 158-160 (Stevens, J., dissenting in part and concurring in the judgment in part). In view of Justice White's opinion, petitioner errs in stating (Br. 10) that the Court was "unanimous[]" in holding that cumulative punishments for CCE and drug conspiracy were barred.

concurring in the judgment in part and dissenting in part), it would have given the defendant a windfall if the Court had nonetheless reversed his conviction or sentence on the more serious offense, the later prosecuted CCE charge. Accordingly, the Court's disposition of the two convictions in *Jeffers* does not, strictly speaking, govern the disposition of a case like this, in which the defendant was tried in a single proceeding for both CCE and a Section 846 drug conspiracy, and in which the Court has before it both convictions and sentences. We nevertheless believe that the result in *Jeffers* appropriately reflects Congress's intent with regard to punishment in cases in which the defendant is convicted of CCE and of a Section 846 drug conspiracy based on the same agreement.[8]

2. Petitioner argues (Br. 10) that "the Court [in *Jeffers*] concluded * * * that Congress did not intend to authorize cumulative punishment for conduct that violates both the conspiracy and CCE statutes, and that the Double Jeopardy Clause therefore bars such cumulative punishment." If petitioner intends to suggest that the Court determined in *Jeffers* that Congress intended to bar dual convictions

[8] The Third Circuit's approach to cases of this sort is somewhat similar to that of the Seventh Circuit. When a defendant is convicted of CCE and a Section 846 drug conspiracy based on the same agreement, the Third Circuit permits the sentencing court to enter two convictions and a single, general sentence on both counts, not to exceed the punishment available on the most serious offense. See *United States* v. *Fernandez*, 916 F.2d 125 (3d Cir. 1990), cert. denied, 500 U.S. 948 (1991). We believe that the Seventh Circuit's concurrent sentence approach is the better practice and more precisely coincides with the result in *Jeffers*.

and concurrent sentences for CCE and Section 846 drug conspiracy, he is mistaken. As explained above, the Court in *Jeffers* left intact the defendant's dual convictions and concurrent sentences. The decision thus could not be read to prohibit them. Instead, the plurality in *Jeffers* used the term "cumulative sentences" to refer to a different issue: the permissibility of "pyramiding" sentences, *i.e.*, permitting consecutive sentences that resulted in total punishment greater than would have been imposed for the more serious of the two offenses.[9] The plurality found such "cumulative penalties" to be improper. 432 U.S. at 157 (opinion of Blackmun, J.) (concluding that "Congress did not intend to impose cumulative penalties under §§ 846 and 848"); see also *id.* at 160 (opinion of Stevens, J.) (concurring in the judgment "to the extent that it vacates the cumulative fines"). But, since petitioner was not subject to that sort of "cumulation" or "pyramiding" of penalties, the Court's decision in *Jeffers* provides no support for his position that the mere entry of dual convictions and concurrent sentences is impermissible.[10]

[9] *Jeffers*, 432 U.S. at 156-158 (opinion of Blackmun, J.) (discussing the issue of "pyramiding," and concluding that the sentencing court had "no power * * * to impose * * * a fine greater than the maximum permitted by § 848" for the two convictions). Ordinarily, the penalty for violating the CCE statute is higher than that for violating Section 846. There may be some unusual situations, however, in which the application of the Sentencing Guidelines leads to the opposite result. See, *e.g.*, *United States* v. *Jelinek*, 57 F.3d 655, 660 (8th Cir. 1995), petition for cert. pending, No. 95-5343; *United States* v. *Chambers*, 944 F.2d at 1268-1269.

[10] As petitioner observes (Br. 11), since *Jeffers* was decided, Congress has amended both the CCE and drug conspiracy

3. An examination of the structure, history, and purposes of the CCE and drug conspiracy statutes confirms that the *Jeffers* result is what Congress intended. Congress did not structure the CCE offense simply as a multiplier or aggravation of a Section 846 drug conspiracy. The CCE offense is defined in a separate statutory provision, 21 U.S.C. 848. That definition of the CCE offense makes no reference to Section 846, the drug conspiracy statute, just as Section 846 defines the drug conspiracy offense without reference to the CCE statute. Moreover, the definition of a CCE creates a complex, hybrid offense, which has aspects of both an offense requiring concerted activity ("in concert with") and a substantive offense (requirement of commission of "a continuing series of [drug] violations * * * from which [the defendant] obtains substantial income or resources"). By contrast, Section 846 defines a pure conspiracy offense; there is no requirement that any overt act be committed. *United States* v. *Shabani*, 115 S. Ct. 382 (1994). The penalties for CCE are also prescribed independently of the penalties for any other drug offense, and they are among the most severe penalties in federal law. See 21 U.S.C. 848(b) (life imprisonment without possibility of release); 21 U.S.C. 848(e) (death penalty). The penalties for a Section 846 drug conspiracy depend on the penalties

---

statutes, but has elected not to modify the penalty scheme in any respect that bears on the question of multiple punishments. That cannot be construed as congressional acquiescence in a rule that dual convictions and concurrent sentences are impermissible for CCE and a Section 846 drug conspiracy based on the same agreement, since neither *Jeffers* nor any other case decided by this Court adopted such a rule.

prescribed for the crimes that are the object of the conspiracy, and do not refer to or depend on the penalties set forth for CCE.

All of those features suggest that Congress intended to create a distinct statutory offense when it enacted the CCE statute, and that it viewed the commission of that offense as an order of magnitude more serious than the participation in a simple Section 846 drug conspiracy. In light of those distinctions, it is appropriate to presume that Congress intended to permit dual convictions with concurrent sentences for violation of the drug conspiracy statute and the CCE offense, particularly in view of the practical disadvantages to the government of a contrary rule and the absence of adverse collateral consequences to a defendant from the entry of such a judgment, see pp. 20-24, *infra*. It is true that the *Jeffers* plurality found that Congress did not intend to permit "pyramiding" of penalties for CCE by imposing consecutive terms of imprisonment or cumulative fines for violations of CCE and Section 846 based on the same agreement. 432 U.S. at 156 (opinion of Blackmun, J.). See also *Garrett*, 471 U.S. at 794-795 (stating that *Jeffers* plurality "reasonably concluded" that there would be little purpose in imposing cumulative penalties). But that does not mean that Congress intended to bar dual convictions and concurrent prison sentences for violation of the CCE and drug conspiracy statutes, so long as the total prison term and fine does not exceed that which would have been imposed for the CCE violation alone.

4. The decision in *Ball* v. *United States*, 470 U.S. 856 (1985), on which petitioner places his primary reliance (see Pet. Br. 12-19), does not require a

contrary conclusion. In *Ball*, the defendant, who had previously been convicted of a felony, was charged with receiving a firearm as a convicted felon, in violation of 18 U.S.C. 922(h)(1) (1982), and for possessing that same firearm as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1) (1982). The trial court imposed consecutive sentences for the two convictions, and the court of appeals accepted the government's concession that such consecutive sentences were improper. The court of appeals held that Congress "did not authorize pyramiding penalties," 470 U.S. at 858 (quoting *United States* v. *Ball*, 734 F.2d 965, 966 (4th Cir. 1984)), and ordered that the sentences be modified to run concurrently.

This Court held that it was permissible to indict and try a defendant on both counts, even when "a single act is relied upon to establish [the defendant's] unlawful receipt and his unlawful possession of the same firearm." 470 U.S. at 859. But, the Court held, "[a]ll guides to legislative intent * * * show that Congress intended a felon in [the defendant's] position to be convicted and punished for only one of the two offenses if the possession of the firearm is incidental to receiving it." *Id.* at 861. Because Congress intended only one conviction and, *a fortiori*, only one punishment to be imposed, "[t]he remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress' intention." *Id.* at 864. Accordingly, the Court remanded for the district court to vacate one of the convictions. *Id.* at 865.

Unlike in *Ball*, "[a]ll guides to legislative intent" do not suggest that Congress wanted to preclude dual convictions and concurrent sentences in this case.

The structural relationship, purposes, and history of the offenses at issue in *Ball*—receiving and possessing a gun—differ significantly from the offenses at issue in this case. In addition, the practical consequences of permitting dual convictions and concurrent sentences in *Ball* differ substantially from the consequences of doing so in the context of this case.

a. Initially, the overlap between the offenses of illegally receiving and possessing a gun as a convicted felon is virtually complete. All cases of illegal receipt of a gun are also cases of illegal possession. *Ball*, 470 U.S. at 862. And virtually all cases of illegal possession are also cases of illegal receipt; the only exception would appear to be the extraordinary cases in which the defendant manufactured the gun himself. *Id.* at 862 n.9. Thus, Congress would reasonably have expected that convicted felons who possess guns will always—or virtually always—be guilty of both offenses, and there is no reason to think that Congress would have intended more than one conviction and sentence to be entered for that form of violation.

The same cannot be said for CCE and a Section 846 drug conspiracy; many drug conspiracy cases will not involve commission of a CCE offense by anyone. Moreover, even where some of the members of a Section 846 drug conspiracy also commit the CCE offense, others—who did not "occup[y] a position of organizer, a supervisory position, or any other position of management," 21 U.S.C. 848(c)(2)(A), or who did not "obtain[] substantial income or resources" from the venture, 21 U.S.C. 848(c)(2)(B)—could not be convicted of the CCE offense. The

overlap between the two statutes is much less than in *Ball*.

b. The history of the receipt and possession statutes also demonstrates that Congress intended the two as alternatives. As the Court noted in *Ball*, the receipt statute was "part of a carefully constructed package of gun control legislation, which had been in existence for many years." 470 U.S. at 862 (internal quotation marks omitted). By contrast, the possession statute was a "last-minute Senate amendment" to the statute that was "hastily passed, with little discussion, no hearings, and no report." *Id.* at 863. It was "enacted as supplementary legislation," and was intended to "fill[] the gaps in and expand[] the coverage of" the receipt statute. *Ibid.* Based on that history, the Court in *Ball* was "persuaded that Congress had no intention of creating duplicative punishment for one limited class of persons falling within the overlap between the two [statutes]." *Id.* at 864.

No such inference can be drawn from the relationship between the CCE offense and a Section 846 drug conspiracy. There is no reason to believe that either statute was intended to fill gaps in coverage created by the other, nor is there any basis for inferring that Congress intended one as an alternative to the other. Rather, both statutes were intended independently to define violations of the narcotics laws.

c. In addition, unlike in *Ball*, practical concerns suggest that Congress would not have intended to prohibit separate convictions and concurrent sentences for a CCE and drug conspiracy based on the same agreement. One of the reasons for entering dual convictions and concurrent sentences in a case like this is that it is possible that the defendant could,

either on direct review or years later on collateral attack, obtain reversal of the CCE conviction. Given the hybrid nature of the CCE offense, a reversal could stem from trial error or insufficiency of proof that relates only to the elements that clearly distinguish a CCE from a simple conspiracy: the existence of the "continuing series of violations"; the requirement that the defendant act in concert with "five or more persons"; the need to show that the defendant played a supervisory role; or the requirement that the defendant have obtained "substantial income or resources" from his violations. Such a reversal would provide no basis for upsetting the drug conspiracy conviction. Congress would no doubt have realized that a separate conviction and concurrent sentence for the drug conspiracy offense would be the simplest and most effective way to ensure that the defendant who obtains reversal of his CCE conviction on such a ground would still be appropriately punished for the drug conspiracy that he committed. See *United States* v. *Bond*, 847 F.2d 1233, 1239 (7th Cir. 1988).

Those practical concerns have no force in the *Ball* situation. Because the elements of the offenses of illegal receipt and illegal possession of a gun are virtually coextensive, a defendant could rarely if ever obtain a reversal of his conviction on one of the two offenses without also demonstrating that he is entitled to a reversal on the other. Congress therefore might have intended, as *Ball* held it did, that there be only one conviction for that same conduct, without creating any realistic risk that a defendant might someday evade just punishment for his conduct as a result of entering only a single count of conviction. Unlike in this case, Congress's intent

to preclude separate convictions and concurrent sentences in that situation in *Ball* may reasonably be inferred.

d. Finally, the threat of adverse consequences for the defendant is much less here than in *Ball*. The Court explained in *Ball* that there were two adverse consequences of the separate conviction and concurrent sentence. First, "the presence of two convictions on the record may * * * result in an increased sentence under a recidivist statute for a future offense." 470 U.S. at 865.[11] Second, "the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction." *Ibid.* Neither of those concerns generally exists in the case of dual CCE/Section 846 drug conspiracy convictions.

With respect to sentencing under recidivist provisions, the federal Sentencing Guidelines—which came into effect after this Court's decision in *Ball*—would not produce an enhanced sentence in a subsequent sentencing merely because of the entry of dual CCE/drug conspiracy convictions based on the same agreement. The Guidelines use the number and characteristics of prior sentences—not the raw number of convictions—to calculate the defendant's criminal history category. See Guidelines § 4A1.1.

[11] The Court in *Ball* also noted that the presence of two convictions "may delay the defendant's eligibility for parole." 470 U.S. at 865. Since parole has now been abolished in the federal system, see Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, §§ 212, 218, 98 Stat. 1987, 2027, that no longer is an adverse consequence of the entry of two convictions.

But "[p]rior sentences imposed in related cases are to be treated as one sentence for purposes of" the calculation. Guidelines § 4A1.2(a)(2). A CCE and a Section 846 drug conspiracy sentence based on the same agreement and tried at the same time would be considered "related" under the Guidelines. See Guidelines § 4A1.2, Application Note 3. The Guidelines instruct sentencing courts to "[u]se the longest sentence of imprisonment if concurrent sentences were imposed." Guidelines § 4A1.2(a)(2). Thus, under the Guidelines regime, a defendant in petitioner's position would not suffer any adverse consequences in a future sentencing proceeding from having received dual convictions and concurrent sentences.[12]

With respect to the "societal stigma" or impeachment value attached to the second conviction, it is

[12] Congress has required a mandatory life sentence for certain drug distribution violations involving particularly large quantities of controlled substances if the defendant commits the offense "after two or more prior convictions for a felony drug offense have become final." 21 U.S.C. 841(b)(1)(A). See 21 U.S.C. 802(43) (to be codified in 1994 edition) (defining "felony drug offense"). The courts of appeals would not count the CCE and drug conspiracy convictions in a case like this as separate convictions for purposes of that provision, especially if the CCE and drug conspiracy offenses are viewed as greater and lesser included offenses. See, *e.g.*, *United States* v. *Liquori*, 5 F.3d 435, 437 (9th Cir. 1993) (citing cases), cert. denied, 114 S. Ct. 738 (1994).

It is also possible that a defendant convicted of CCE and a Section 846 drug conspiracy based on the same agreement could in some future case face a state sentencing court, where the federal Guidelines would be of no relevance. But it is unlikely that Congress fashioned its penalties for federal felony drug violations in light of possible collateral consequences under state law.

important to recognize that the CCE offense is one of the most serious criminal offenses in federal law. It is therefore doubtful that a defendant, once convicted of CCE, would suffer any incremental stigma as a result of the fact that he was also convicted of a Section 846 drug conspiracy based on the same agreement. Indeed, in light of the fact that there would be a jury verdict of guilty on the Section 846 charge that would be a matter of public record, the defendant would be extraordinarily unlikely to suffer any additional stigma from the additional conviction. Even if there were some increment of societal stigma or potential for impeachment that would attach to the drug conspiracy conviction, however, there would be no reason to believe that Congress, having created the CCE offense with its extraordinary penalties, would have been concerned that some CCE defendants would suffer such a relatively minor adverse consequence. Therefore, it would provide no basis for inferring that Congress would have wanted to preclude dual convictions in this situation.

II. IF THE COURT CONCLUDES THAT THE ENTRY OF SEPARATE CONVICTIONS AND CONCURRENT SENTENCES CONTRAVENES CONGRESSIONAL INTENT, THE APPROPRIATE COURSE WOULD BE TO REQUIRE ENTRY OF A SINGLE, MERGED CONVICTION AND SENTENCE ON THE TWO COUNTS

Those courts of appeals that do not permit the entry of a separate conviction or concurrent sentence for CCE and a Section 846 drug conspiracy based on the same agreement have adopted three different approaches to the treatment of the dual jury verdicts of guilty in such a case. In our view, the approach

developed by the Second Circuit of combining or merging the two counts into a single conviction best accommodates the interests of the government in ensuring that the defendant receive just punishment for the crimes he has committed and the interests of the defendant in avoiding adverse collateral consequences.

1. The Second Circuit has held that the appropriate course when the jury finds the defendant guilty of CCE and drug conspiracy based on the same agreement is to "combine" the two convictions in a single count, for which the punishment may not exceed that applicable to the greater offense. See, *e.g.*, *United States* v. *Aiello*, 771 F.2d 621, 632-635 (2d Cir. 1985). Under that approach, "the conviction[] for the lesser offense[] would cease to exist unless the conviction for the greater offense should be reversed, in which event the defendant could be punished for the lesser offense[]." *Id.* at 632. At that time, "[a]ny time already served would be counted as credit against the newly imposed sentence." *Id.* at 634. Presumably, any fine already imposed would also be credited against any newly imposed fine. As we understand it, the judgment in such a case would indicate that a single conviction is being entered for two offenses.

The reason for the Second Circuit's approach is that, if the defendant succeeds in having his conviction for the greater offense overturned on appeal or on collateral attack, the defendant should not have the windfall of avoiding punishment altogether for the second offense. See *Aiello*, 771 F.2d at 633-634. See also *United States* v. *Lindsay*, 985 F.2d 666, 670-671 (2d Cir.), cert. denied, 114 S. Ct. 103 (1993); *United States* v. *Benevento*, 836 F.2d 60, 73 (2d Cir. 1987),

cert. denied, 486 U.S. 1043 (1988). Cf. *Tinder* v. *United States*, 345 U.S. 565, 569-570 (1953) (remanding case for entry of conviction and sentence on lesser included misdemeanor after felony conviction was overturned). The defendant, however, suffers no adverse consequences from the entry of the single, merged conviction. In any future recidivist proceeding, there would be only one conviction on the defendant's record, covering both the CCE and Section 846 drug conspiracy offenses. Nor would defendant suffer any other adverse consequences; there is no reason to believe that the "societal stigma" to which such a defendant would be subject would be any greater than that to which he would have been subjected had he been convicted only of a CCE violation. Cf. *Ball*, 470 U.S. at 865.

In our view, if dual convictions and concurrent sentences are held improper, the Second Circuit's approach best accommodates the interests of the government and is consistent with Congress's probable intent. In addition, it ensures that the defendant will receive the punishment that he deserves, while protecting the defendant against any possible adverse consequences.

2. Based on concerns similar to those underlying the Second Circuit's "combination" approach, the Ninth Circuit has taken a somewhat different course. Although the Ninth Circuit has not specifically addressed the issue in a case where a defendant was convicted of CCE and a Section 846 drug conspiracy, that court has adopted a general approach for cases in which it is permissible to charge and try a defendant for two offenses, but to enter only one conviction. The Ninth Circuit has held that the appropriate

course of action in such a case is to "stay[] both the sentence and entry of judgment of conviction on all but one count." *United States* v. *Palafox*, 764 F.2d 558, 564 (9th Cir. 1985) (en banc).[13] If the conviction that is entered is ultimately reversed on appeal or on collateral attack, the district court could then enter a judgment of conviction and sentence on the remaining count. That would ensure "that the defendant is punished, but punished only once," and "[i]t avoids both the punitive collateral effects of multiple convic-

[13] The Ninth Circuit's procedure mirrors that formerly followed by some courts under the concurrent sentence doctrine. After affirming one of two convictions on which sentence ran concurrently, those courts would vacate the judgment with respect to the other, but note that the sentence and conviction could be reimposed at a later date in the event that a defect were discovered in the conviction that was affirmed. See, *e.g.*, *United States* v. *De Bright*, 730 F.2d 1255 (9th Cir. 1984) (en banc); *United States* v. *Butera*, 677 F.2d 1376, 1386 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Hooper*, 432 F.2d 604, 606 n.8 (D.C. Cir. 1970). But see, *e.g.*, *United States* v. *Vargas*, 615 F.2d 952, 960 (2d Cir. 1980) (applying the concurrent sentence doctrine to leave undisturbed the unreviewed district court judgment); *United States* v. *Lampley*, 573 F.2d 783, 788 (3d Cir. 1978) (same); *United States* v. *Nelson*, 733 F.2d 364, 371 n.17 (5th Cir.) (same), cert. denied, 469 U.S. 937 (1984); *United States* v. *Peters*, 617 F.2d 503, 506 (7th Cir. 1980); *United States* v. *Wilson*, 671 F.2d 1138, 1139 n.2 (8th Cir.) (same), cert. denied, 456 U.S. 994 (1982). Under 18 U.S.C. 3013, a special assessment must be imposed with respect to each offense on which the defendant is convicted. Since each offense now carries with it a cumulative special assessment, the concurrent sentence doctrine now has virtually no application in the federal system. See *Ray* v. *United States*, 481 U.S. 736 (1987) (per curiam).

tions as well as the direct effects of multiple sentences." *Ibid.*[14]

In our view, although the Ninth Circuit approach represents a partial accommodation of the important interests at stake in cases of this sort, the Second Circuit's approach is preferable. Initially, if the CCE conviction were ever overturned, it is possible that speedy trial or related concerns could be thought to threaten the ability of the government to obtain a new judgment on the Section 846 jury verdict that has been held in abeyance. That could add needless complexity to the process of ensuring that the defendant receives the punishment Congress intended for his participation in the Section 846 drug conspiracy.

In any event, the Ninth Circuit's approach could interfere with the strong policy against piecemeal appeals in criminal cases. In an initial appeal in such a case, the defendant could not raise—and the court could not decide—any issue that concerns only the Section 846 drug conspiracy conviction, for the only issue before the appellate court would be whether the

---

[14] The Ninth Circuit has employed the *Palafox* approach in subsequent cases involving dual convictions where cumulative punishments could not be imposed, although none of those cases specifically involved convictions for drug conspiracy and CCE. See, *e.g.*, *United States* v. *Compton*, 5 F.3d 358, 360 (9th Cir. 1993); *United States* v. *Sanchez-Lopez*, 879 F.2d 541, 549-550 (9th Cir. 1989); *United States* v. *Sanchez-Vargas*, 878 F.2d 1163, 1172 (9th Cir. 1989); *United States* v. *Andersson*, 813 F.2d 1450, 1460-1462 (9th Cir. 1987). Compare *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989) (holding that conviction on drug conspiracy offense must be vacated in light of CCE conviction, but not stating whether drug conspiracy conviction could be revived if CCE conviction were ever overturned), cert. denied, 497 U.S. 1003 (1990).

CCE conviction and sentence is valid. Indeed, there is some possibility that a judgment that purports to stay disposition of the drug conspiracy count would be insufficiently final to support an appeal. See *United States* v. *Luciano-Mosquera*, Nos. 92-1923 et al., 1995 WL 500601, at *3 n.2 (1st Cir. Aug. 28, 1995) ("[A] criminal judgment involving multiple counts is not final and appealable unless the record discloses the precise disposition (e.g., the sentence) for each count."); *United States* v. *Wilson*, 440 F.2d 1103, 1104 (5th Cir.), cert. denied, 404 U.S. 882 (1971) & 405 U.S. 1016 (1972). Even if such a partial disposition of the case could support an appeal, legal issues concerning the validity of the Section 846 drug conspiracy conviction could lie dormant for years, until and unless it is necessary to enter judgment on that conviction. Only at that time could the issues be brought before the court of appeals.

Under the Second Circuit's approach, such piecemeal appeals would be avoided; the defendant could (and should) challenge any defects regarding both the CCE and the drug conspiracy charges on his initial appeal of the merged conviction. Indeed, the validity of both charges would be squarely before the court at that time, since a reversal on the ground of a defect in the CCE count would lead only to a remand for resentencing, while a reversal on the ground of one or more defects affecting both the CCE and drug conspiracy counts would lead to a remand for vacatur of the conviction. See *Aiello*, 771 F.2d at 634 n.8.

3. Several courts have held simply that a defendant may be convicted of only one offense (the CCE or the drug conspiracy) and that a judgment imposing two convictions must be set aside and remanded for

the district court to vacate one of the convictions—presumably, the lesser one.[15] Those courts have not made clear whether a conviction on the Section 846 drug conspiracy count could later be entered if the CCE conviction were ever overturned on collateral attack. If those courts would permit such a conviction to be entered, their approach is essentially identical with that adopted by the Ninth Circuit. If they would not permit such a conviction to be entered, however, their approach is mistaken. It would permit a defendant who engages in a drug conspiracy in violation of Section 846 and who is properly tried and found guilty by a jury for that violation to escape without conviction or punishment, so long as he was also convicted of a CCE offense at the same time and that CCE conviction is later found to be defective. That is not a plausible understanding of Congress's intent regarding punishment for defendants who commit both Section 846 drug conspiracy and CCE violations. Nor is it necessary to achieve any other legitimate goal. Accordingly, it should be rejected.

---

[15] See *United States* v. *Cloutier*, 966 F.2d 24, 30-31 (1st Cir. 1992); *United States* v. *Butler*, 885 F.2d 195, 201-202 (4th Cir. 1989); *United States* v. *Chambers*, 944 F.2d at 1268-1269; *United States* v. *Rivera*, 900 F.2d 1462, 1478 (10th Cir. 1990) (en banc); *United States* v. *Cruz*, 805 F.2d 1464, 1479 (11th Cir. 1986), cert. denied, 481 U.S. 1006 & 482 U.S. 930 (1987). The Eighth Circuit has adopted an approach whereby the district court may enter two convictions, which the court of appeals reviews on appeal. If both are upheld, however, the court of appeals remands the case to the district court for vacatur of one of the convictions. *United States* v. *Jelinek*, 57 F.3d 655 (8th Cir. 1995), petition for cert. pending, No. 95-5343.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

OCTOBER 1995

APPENDIX

1. 21 U.S.C. 846 provides as follows:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2. 21 U.S.C. 848 provides in relevant part as follows:

§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount

authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C. Code, secs. 24-203—24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section—

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph [(1)(B)], the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

* * * * *